UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 32

(Atwater, CA)

MANUEL E. VIEIRA, INC.
d/b/a A.V. THOMAS PRODUCE
COMPANY

Employer[1]

and Case 32-RC-5301

UNITED FOOD AND COMMERCIAL
WORKERS INTERNATIONAL UNION
LOCAL 1096[2]

Petitioner

DECISION AND DIRECTION OF ELECTION

Manuel E. Vieira, Inc., d/b/a A.V. Thomas Produce Company, herein called the Employer, is in the business of packing and wholesaling sweet potatoes/yams. The Employer processes and packs sweet potatoes/yams at two facilities. One of these facilities is located at 3978 Sultana Drive, Atwater, CA ("the Atwater facility"), and it operates year-round. The other facility, also referred to as a "shed," is located in Livingston, CA ("the Livingston facility"), and it does not operate year-round.

The United Food and Commercial Workers International Union Local 1096, herein called the Petitioner or the Union, filed a petition with the National Labor Relations Board under Section 9(c) of the National Labor Relations Act seeking to represent a unit of all full-time and regular part-time employees covered under the Act; excluding all clerical employees, guards, and supervisors as defined by the Act. Hearing officers of the Board held three days of hearings, and

[1] The name of the Employer appears as amended at the hearing.
[2] The name of the Petitioner appears as amended at the hearing.

the Employer filed a Post-Hearing Brief and Supplemental Post-Hearing Brief, each of which I have duly considered. I have also duly considered the Union's arguments that were raised orally during the hearing.

The primary issue here is whether the unit sought by the Petitioner, which was amended at the hearing to include "seasonal" employees, is appropriate for collective bargaining. The Employer contends that the unit should exclude such individuals as "temporary" or "casual" employees. The parties agree that the unit should at least include the Employer's essentially year-round full-time and regular part-time employees, herein referred to as the core group.

For the reasons noted below, I find that the petitioned-for unit is an appropriate unit and that certain of the disputed employees are properly characterized as seasonal employees with a reasonable expectation of employment from year to year, rather than as temporary or casual employees with no such expectation. These seasonal employees perform the same work as the core group employees, under the same supervision, for the same pay and, largely, for the same benefits. The seasonal employees therefore share a community of interest with the core group employees, and possess sufficient interest in employment conditions to warrant their inclusion in the unit. For the reasons discussed below, I also find that the election should be postponed until the next peak season, which is set to occur in about October-November 2005.

OVERVIEW OF THE EMPLOYER'S OPERATIONS

The Employer is engaged in the packing and wholesaling of sweet potatoes/yams for chain store customers. The sweet potato harvest begins in August of each year and continues until late October or early November, depending upon the weather. Sweet potatoes/yams are delivered to the Employer in trucks and then unloaded and stored in on-site warehouses. The packing process includes washing and drying the sweet potatoes/yams, dumping them on to a

conveyor belt, packing them into boxes and stacking the boxes on pallets, and moving the pallets from the end of the conveyor belt to the loading dock for placement on trucks.

The highest-ranking member of management at the Atwater facility is Carlos Vieira, the Employer's Vice President of Packing and Sales Division. Reporting to Carlos Viera is the Manager and Packing Line Supervisor, Cruz Gutierrez. As Packing Line Supervisor, Gutierrez hires, supervises and directs the work of all classifications of employee at issue in this proceeding.[3]

The Atwater and Livingston facility contain up to five production lines, each of which are generally operated by 30-35 employees. The classifications of workers utilized in packing the sweet potatoes/yams include forklift drivers (approximately 2 per line), dumper/operators (approximately 2 per line), packers (approximately 22 per line), box makers (approximately 2 per line), and stackers (approximately 2 per line). The Employer submits that it employs a core group of 54 full-time and regular part-time employees who work throughout the year at the Atwater facility.[4] The Employer increases its workforce during certain times of the year, which correspond to those periods with greater consumption of sweet potatoes/yams: Canadian

[3] No one seeks to include these individuals in the unit, and I find that these individuals are excluded from the unit because they are supervisors and/or managerial employees. I also note that the parties stipulated, and I find, that the Employer has no working foreman, and that the foremen, such as Juan Cruz, have the authority to hire and fire and are supervisors within the meaning of the Act.

[4] I note that there is no evidence in the record of the criteria which the Employer utilized in the course of preparing the list of persons that the Employer considers to be its year-round core group of regular full-time and part-time employees. If the Employer's list is based on some substantial minimum amount of annual hours worked, it is not clear from the records what that minimum is for any particular year, or whether the exhibit contains errors. I note that a few of the employees have only worked in one year, and some had not worked even one full week. There are also numerous other employees not included on the list who have worked a similar number of hours over the same number of years as those on the list. The testimony of the Employer's witnesses also failed to shed any light on this matter. For example, after reviewing the pertinent records, Employer manager Carlos Vieira surmised that Employee No. F10108 would be part of the Employer's regular year-round part-time crew based on the number of hours the employee had worked; however, that employee is not included on the Employer's list of core group employees. Although I will rely on the Employer's list for purposes of making some of the community of interest comparisons set forth below, I am not finding that each employee on the Employer's list is a full time or regular part time employee. Therefore, the Union may challenge the votes of an employee on the 54 employee core group list if that employee would not otherwise be eligible to vote under one of the temporary employee formulas.

Thanksgiving (October), United States Thanksgiving (November), Christmas (December) and Easter (March or April). For the Easter peak, the Employer typically adds an additional 50 to 100 people beyond the core group of 54 employees. The United States Thanksgiving peak or "push" is substantially larger than any of the other peaks. At that time, the Employer operates up to five lines and runs two shifts per day. The Christmas peak is a somewhat lesser peak, entailing up to three lines during the day shift and one or two lines during the night shift. The number of persons employed during seasonal peaks has been known to exceed 400 persons (U.S. Thanksgiving, 2004).

The Employer's permanent and seasonal employees often work side-by-side and have the same job classifications. The permanent and seasonal employees also share common supervision, are subject to the same safety rules and employee handbook, utilize the same time clock, receive the same starting pay and overtime pay, and are entitled to utilize the same lunch room.

THE POSITIONS OF THE PARTIES

The Petitioner contends that the Employer's sweet potato processing operations are a traditional seasonal operation in which employees who work less than year-round should nevertheless be considered included "seasonal" employees. It also contends that the Employer draws its employees from a stable, local labor force, comprised of persons with a reasonable expectation of reemployment from year-to-year, assuming that their work is satisfactory to the Employer. In addition, the Petitioner contends that the Employer benefits from having well-trained returnees, and that the Employer in fact rehires employees from season to season regardless of whether the Employer or employee initiates that rehire process. The Petitioner also takes the position that the seasonal employees work in the same classifications as do permanent

employees under the same working conditions, and that such seasonal employees have the realistic prospect of promotion to permanent employment. Although the Petitioner raised some questions regarding who the regular full time and part time employees are, it seeks their inclusion in the unit and does not argue that full time or regular part time employees should be excluded from the unit.[5]

Conversely, the Employer contends that the employees who work less than year-round should be excluded as "temporary" employees. Among other things, the Employer relies on alleged statements to employees that they are only being hired for particular holiday seasons, an alleged requirement that employees fill out new job applications each year, the absence of a formal recall list, and the purported absence of employees returning on a regular basis. The Employer submits that the Region should find that the only appropriate unit is one that consists of those employees who worked at least 80% of the payroll periods in 2003 and 2004 or, in lieu thereof, the employees identified by the Employer as members of its core year-round regular full-time and part-time staff. The Employer further argues that without the bargaining unit having been determined, the Region is not in a position to have ascertained the adequacy of the Petitioner's showing of interest submitted in this matter.[6]

ANALYSIS

[5] During the hearing, Petitioner offhandedly questioned the accuracy of the payroll records submitted by the Employer. However, Petitioner has not submitted a post-hearing brief or advanced an argument at hearing that identified any specific defects, omissions or errors in the Employer's payroll records. I have therefore opted to treat the records and the hours reflected thereon as accurate and as the best available source of evidence of the hours worked by employees at all pertinent times.

[6] I have determined that in this type of seasonal employee case, the Petitioner must have signed cards from 30% of the employees who were employed in the petitioned-for unit on the date on which the Petition was filed. The Employer has been asked to provide the Region with its payroll records for the period that includes November 2, 2004, the date on which the petition was filed. Once the Region has received that document, I will make the administrative determination of whether the Union has made a sufficient showing of interest, and I will then notify the parties. If the payroll records are not received in a timely manner, I will base my showing of interest determination on the evidence currently available, and, for purposes of this investigation, each of the signed authorization cards provided by the Union will be presumed to have been signed by a member of the unit. See Section 11030.2 of the National Labor Relations Board Casehandling Manual, Part 2, Representation Proceedings.

The only issue in this case is whether the Employer has regular seasonal employees, who should be included in the unit with the full time and regular part time employees, or whether the Employer's seasonal employees are casual or temporary seasonal employees, who should be excluded from the unit. In determining whether seasonal employees are regular seasonal employees who have a sufficient community of interest with the full time and regular part time employees to warrant their inclusion in the same unit is whether the seasonal employees have a reasonable expectation of future employment with the employer. In determining whether seasonal employees have such an expectation, the Board will consider actual commitments made to employees about future employment and by an examination of whether the evidence as a whole demonstrates that the employees have a reasonable expectation of re-employment.

In assessing the expectation of future employment among seasonal employees under the circumstances as a whole, the Board considers such factors as the size of the area labor force, the stability of the Employer's labor requirements and the extent to which it is dependent upon seasonal labor, the actual reemployment season-to-season of the worker complement, and the Employer's recall or preference policy regarding seasonal employees. *Maine Apple Growers, Inc.*, 254 NLRB 501, 502 (1981); *Baumer Foods, Inc.*, 190 NLRB 690 (1971); *Macy's East*, 327 NLRB 73 (1998).[7] I turn now to an application of these factors.

In cases such as this, the Board must determine whether any of the arguably regular seasonal employees have a sufficient community of interest with the full time and regular part time employees to warrant their inclusion in the unit. In assessing whether employees are more properly characterized as regular seasonal employees, as opposed to casual or temporary

[7] The Employer's choice of how to label the employees is not determinative. For example, where an employer calls back a substantial number of the same employees each year, even though they are described as "temporary," they are included in the unit. *Tol-Pac Inc.*, 128 NLRB 1439 (1960).

seasonal employees, the Board considers such factors as the size of the area labor force,[8] the stability of the Employer's labor requirements and the extent to which it is dependent upon seasonal labor, [9] the actual reemployment season-to-season of the worker complement, and the Employer's recall or preference policy regarding seasonal employees. *Maine Apple Growers, Inc.*, 254 NLRB 501, 502 (1981); *Baumer Foods, Inc.*, 190 NLRB 690 (1971); *Macy's East*, 327 NLRB 73 (1998).[10] I turn now to an application of these factors to the facts in this case.

Size of the Area Labor Force

I initially find that the record contains somewhat limited evidence with respect to the size of the area labor force and with respect to the particular geographical area in which the labor force resides.[11] While that evidence is not conclusive, it does support a finding that a number of employees in the labor market do return to the employer's operation after they are initially laid off at the end of a peak season. Although, he was unable to confirm that a majority of the Employer's workers come from within 20 to 30 miles of the Employer's Atwater, California headquarters, the Employer manager, Carlos Vieira, testified generally that the Employer draws

[8] The Region notes that much of the area around each of the Employer's operations is rural and/or agricultural land. Thus the local labor market, although larger geographically, is not as largely populated as the labor market for employers that are operating in cities or suburbs.

[9] In this regard, the Board considers such factors as whether the seasonal employees have a pattern of regular seasonal employment with the employer that indicates a "relatively stabilized demand for, and dependence on such employees by the employer, and, likewise, a reliance upon such employment by a substantial number of employees in the labor market who return to the employer's operation. *Seneca Foods Corporation*, 248 NLRB 1119 (1980); *Kelly Brothers Nurseries*, 140 NLRB 82, 85 (1962).

[10] The Employer's choice of how to label the employees is not determinative. For example, where an employer calls back a substantial number of the same employees each year, even though they are described as "temporary," they are included in the unit. *Tol-Pac Inc.*, 128 NLRB 1439 (1960).

[11] Petitioner's attorney asked some questions seeking evidence on this issue; however, in doing so, Petitioner's attorney went beyond the scope of this issue and appeared to be seeking evidence going to a possible single employer theory that was not relevant. Thus, the nature of the questioning and the Petitioner attorney's comments in support of his questions made it difficult to determine when the questions really were directed at the pertinent issues. The Hearing Officer allowed some of these questions, but sustained the Employer's objections to other questions. Although some of these rulings may have prevented the Petitioner from eliciting more evidence on this issue, I do not find it necessary to reopen the record solely to take evidence on this point. Rather, I conclude that there is sufficient evidence to support the Petitioner's proposed unit even without definitive evidence as to the size of the local labor market and the percentage of the Employer's employees who live within that market.

workers from the Atwater, Livingston and Modesto, California areas.[12] Importantly, the Employer also admitted, and other evidence suggests, that certain employees typically work in nearby agricultural fields during the spring and summer months before working in the Employer's packing sheds during the fall and winter months, and thus would be considered to have come from the local area labor force.

Stability of the Employer's Labor Requirements and Dependence Upon Seasonal Labor

In *Winkie Manufacturing Company, Inc. v. NLRB*, 348 F.3d 254, 258 (7th Cir. 2003), enforcing 338 NLRB No. 106 (2003)), the U.S. Court of Appeals for the Seventh Circuit accepted the Board's argument that the regular need for a large number of seasonal employees (60 in that case), as contrasted with the much smaller number of seasonal employees (35 and 8, respectively) in other cases such as *Freeman Loader Corp.*, 127 NLRB 514 (1960) and *Macy's East*, 327 NLRB 73 (1998), enabled current seasonal employees to anticipate future openings. See also *Oregon Frozen Foods Company and Ore-Ida Potato Products, Inc.*, 108 NLRB 1668 (1954) (permitting seasonal employees to vote and delaying election until seasonal peak when seasonal employees greatly outnumbered the core group of 30 year-round employees).

In this case, the evidence clearly shows that there is a strong degree of stability to the Employer's labor requirements, because it consistently needs a large number of seasonal employees for the same holiday periods each year. For example, the chart prepared by the Employer (Employer Exhibit 3) appears to indicate that the Thanksgiving 2001 peak was approximately 200 employees, the Thanksgiving 2002 and 2003 peaks were approximately 300 employees, and the Thanksgiving 2004 peak was over 400 employees. Thus, if anything, the volume of business and

[12] While the record contains a single exhibit showing the cities of residence of eight unnamed employees (three employees in Winton, CA, two employees in Delhi, CA, two employees in Livingston, CA and one employee in Merced, CA), I find this small sample to be of limited evidentiary value and not sufficient for me to make a finding as to the size of the area labor force or the towns from which employees are obtained.

number of employees seem to be expanding rather than diminishing over time. The impression of stability with respect to both the Employer's labor requirements and the available seasonal work force is further reinforced by the above-referenced evidence that shows, albeit anecdotally, that certain employees typically work in nearby agricultural fields during the spring and summer months before working in the Employer's packing sheds during the fall and winter months. Thus the strong evidence that each year the Employer requires a large number of employees for differing lengths of time during its three peak seasons, adds supports to the conclusion that the employees who repeatedly work for the Employer during substantial periods of the peak seasons have a substantial and ongoing tie to the Employer's operations.

Actual Reemployment Season-to-Season of the Worker Complement

The Board has traditionally found that seasonal employees can be deemed to have a reasonable expectation of future employment where at least 30% of an employer's seasonal employees have previously worked for the Employer. See *Kelly Brothers Nurseries, Inc.*, 140 NLRB 82, 85 (1962) (spring and fall shipping season employees deemed to have sufficient interest in ongoing employment where 38.6% of spring 1962 employees were returnees and 34% of fall 1961 employees were returnees); *Saltwater, Inc.*, 324 NLRB 343 (1997) (describing Board's practice of including seasonal employees whose return rate is in the "30-percent range"). In this regard, I also note a recent case in which the U.S. Court of Appeals for the Seventh Circuit upheld the Board's determination that, in light of the circumstances as a whole, the employer's seasonal employees had a reasonable expectation of reemployment where the seasonal employees had only a 27% return rate. (*Winkie Manufacturing Company, Inc. v. NLRB*, 348 F.3d 254, 258 (7th Cir. 2003), enforcing 338 NLRB No. 106 (2003)).[13]

[13] See also *Kelly Bros. Nurseries, Inc.*, 140 NLRB 82, 85 (1962) (relying upon substantial portion of employees actually returning to work, despite absence of formal recall policy).

In applying these principles, I first had to determine which employees I would consider for making a meaningful analysis of the return rate of the Employer's temporary employees. As mentioned above, the records show that the Employer has three peak seasons, and that within those seasons, there were brief periods when its employee complement was much higher than the other portions of the peak seasons. The evidence shows that since January of 2001, the Employer has employed over 1500 different employees, even though the maximum number of employees employed at anyone time was less than 450 employees. However, during calendar years 2002-2004, slightly more than 800 of those employees were employed for less than one full pay period, and almost 460 of those short term employees worked one day or less. Thus, including such very short term employees in a re-employment analysis would not give an accurate picture of the likelihood of re-employment for the bulk of the Employer's employees.

In view of these factors, and in view of the Board's goal of using re-employment rates as a basis for determining the likelihood that employees have a reasonable expectation of re-employment, I decided not to consider those employees who only worked only a small number of hours or days for the Employer in any one year, and who therefore only had established a minimal or casual interest in the Employer's operation. Rather, I considered the re-employment rate of only those employees who worked at least 120 hours in a particular year, as those employees had established substantial tie to the Employer.

The Employer records show that there were 277 employees who worked more than 120 hours in 2004. According to the list provided by the Employer, 54 of these employees are members of the Employer's year-round core group of full-time and regular part-time employees. Because the core group employees are not seasonal employees, I concluded that their return rate is not relevant to the determination of the return rate among the arguably seasonal employees,

and, I am not including these 54 employees in the 2004 totals. Thus, there are a total of 224 arguably seasonal employees who were employed by the Employer during 2004.

The next step of the inquiry is to determine how many of the 224 arguably seasonal employees employed by the Employer in 2004 had previously been employed by the Employer for at least 120 hours in one or both of the two previous years. The Employer's records show that 18 of the 224 employees worked at least 120 hours in years 2002 and 2003 and 2004, not including the 15 employees who were from the core group. An additional 61 employees worked at least 120 hours in 2002 or 2003 (but not both), not including the 34 employees who are members of the Employer's core group. Therefore, there are 79 employees who have had significant recurrent employment with the Employer during 2002, 2003 and 2004. These 79 employees with recurrent employment constitute about 35% of the 224 arguably seasonal employees who working during 2004.[14] The 35% returnee rate is indicative of regular seasonal employee status rather than mere casual or temporary seasonal employee status. Of course, if the employees whom the Employer considers to be part of its core group were also to be included in making these calculations, the resulting returnee percentage would be even higher (46%).

Employer's Recall or Preference Policy

Turning to the Employer's recall or preference policy regarding seasonal employees, I find that the evidence supports a finding that the Employer makes a concerted effort to rehire employees who have previously worked for it. Supervisor Cruz Gutierrez testified that he utilizes a list of employees who are interested in returning to work for the Employer, so long as

[14] I also note that in 2004, the Employer's hired about 150 more employees during the brief, busiest period in the Thanksgiving peak season than it had hired at its busiest point in 2002 or 2003. This extra high number of employees for 2004 likely lessened the percentage of the 2004 employees who were rehires from previous seasons.

such employees provide phone numbers at which they may be reached.[15] Gutierrez testified that he calls employees on his list to return to work when the Employer informs him that additional orders necessitate additional employees. The Employer's witnesses repeatedly testified to the benefit derived by the Employer from hiring employees who have previously worked at the facility who consequently do not require the training potentially necessary for a new hire. Manager Gutierrez also testified that without exception all returning employees who submitted an application for the 2004 peak season were permitted to work during that season.[16] While the Employer testified in a conclusionary manner that no "promises" of future employment were made to departing employees, I find that the Employer's practice of rehiring former employees amply demonstrates its de facto preference policy. See *Musgrave Manufacturing Company*, 124 NLRB 258, 261 (1959); *Bogus Basin Recreation Association*, 212 NLRB 833 (1974); *Aspen Skiing Corp.*, 143 NLRB 707, 711 (1963); *Micro Metalizing Co.*, 134 NLRB 293 (1962) (preference given to former employees in rehiring supports inclusion of regular seasonal employees even where no preferential hiring list is utilized); Accord: *California Vegetable Concentrates, Inc.*, 137 NLRB 1779, 1780 (1962). I also note that the Employer's policy of not advertising for job positions, but rather relying upon interested employment candidates to simply "show up", provides further support for my conclusion that the Employer has a de facto preference policy, and additionally supports the conclusion that the Employer has stable labor requirements and is dependent on seasonal labor on a regular and predictable basis.

[15] The list of employees admittedly utilized by manager Cruz Gutierrez in the course of recalling employees who have expressed interest in returning to work was not introduced as an exhibit.

[16] The evidence is mixed with respect to whether it is the employees or the Employer who most frequently initiate the contacts that lead to employees being rehired by the Employer.

Terms and Conditions of Employment of Permanent and Seasonal Employees

The Board also considers whether the duties, working conditions, supervision and/or benefits are substantially similar for both permanent and arguably seasonal employees. *Kelly Bros. Nurseries*, 140 NLRB 82, 85 (1962); *California Vegetable Concentrates, Inc.*, 137 NLRB 1779, 1780 (1962). In this case, I find that this factor strongly supports inclusion of the seasonal employees in the unit. Other than a recently instituted 401(K) plan,[17] the record evidence establishes that the wages, benefits, and terms and conditions of employment of the permanent and seasonal employees are identical. The permanent and seasonal employees work side-by-side, and the Employer even intentionally ensures that they work side-by-side so that the permanent employees can train the seasonal employees as needed. The permanent and seasonal employees share common supervision, are subject to the same safety rules and employee handbook, utilize the same time clock, receive the same starting pay and overtime pay, are entitled to utilize the same lunch room, and perform the same types of work.[18]

Transition from Seasonal to Permanent Employment

Finally, the Board also considers the opportunity employees have to go from seasonal to permanent employment. *California Vegetable Concentrates*, 137 NLRB at 1780; *Winkie Mfg. Co., Inc.*, 338 NLRB No. 106 (2003), affirmed 348 F.3d 254 (7th Cir. 2003). In the present case, the Employer's witnesses admitted that most permanent regular full-time and part-time employees were former seasonal employees. The Employer has no policy prohibiting seasonal

[17] The record reflects that the Employer recently implemented a 401(k) plan for certain employees effective January 1, 2005. In order to be eligible to participate in such plan, an employee must have satisfied some minimum hours of work requirement consistent with the Employee Retirement Income and Security Act (ERISA), but the exact hours requirement is absent from the record. In any event, it appears that satisfaction of the minimum hours requirement, and not whether the Employer considers one a permanent or a temporary employee, is the crucial criterion for eligibility to participate in the 401(k) plan.

[18] Illustrative of the similarities between the working conditions of permanent and seasonal employees is the fact that the record reflects that the Employer apparently does not even inform permanent employees that it considers them to be permanent employees rather than seasonal employees. .

employees from seeking permanent employment, and there are no apparent examples in the record of any employees who were initially hired on a permanent basis without having first served as seasonal employees.

The multi-factor test I apply here is admittedly a flexible one, wherein the Board evaluates whether the totality of a company's hiring practices foster a reasonable expectation of reemployment among the arguably seasonal workers. See *Winkie Manufacturing Company, Inc. v. NLRB*, 348 F.3d 254 259 (7th Cir. 2003), enforcing 338 NLRB No. 106 (2003); *Maine Apple Growers, Inc.*, 254 NLRB 501, 503 (1981) (party need not demonstrate a positive finding for each factor in order to sustain a finding of reasonable expectation of future employment). In deciding this case, I am guided by the teachings derived from other Board decisions involving traditional seasonal packing operations. Operations dealing in agricultural products, like the Employer here, are similar to seasonal-type industries where the Board has included seasonal employees in units with permanent employees notwithstanding the fact that such enterprises are also conducted on a year-round basis. *Knouse Foods Cooperative*, 131 NLRB 801 (1961); *Oregon Frozen Foods Company and Oregon Potato Products*, 108 NLRB 1668 (1954). The regular employment here of seasonal employees at the same holiday periods (Easter, Canadian Thanksgiving, United States Thanksgiving, and Christmas) each year indicates the existence of a relatively stabilized demand for, and dependence upon, such seasonal employees by the Employer and, likewise, a reliance upon such employment by a substantial number of employees in the labor market who return to the Employer's operations each year. *California Vegetable Concentrates*, 137 NLRB 1779 (1962).

Applying all of these factors, and particularly taking into account the 35% return rate, the identical working conditions of seasonal and permanent employees, the de facto recall preference

policy, and the possibility of promotion from seasonal to permanent, I find that certain of the employees in this case must be considered seasonal rather than casual, and that they should therefore be included in the unit, subject to the eligibility formula discussed below.[19] Having found that there is a sufficiently reasonable expectation of future employment to support the inclusion of seasonal employees, I turn now to the specific eligibility formula to be applied in this case.

The Need for an Eligibility Formula in this Case

With regard to full time and regular part time employees, the Board typically uses a simple formula to determine who is eligible to vote in an election: employees in the unit are eligible to vote if they were employed on the date of the election and during the payroll period ending immediately prior to the Decision and Direction of Election. This approach will be applied to the Employer's full time and regular part time employees. However, with regard to regular seasonal employees, the Board uses particularized eligibility formulas. See *Saltwater, Inc.*, 324 NLRB 343 (1997) (in nontraditional industries, Board permits utilization of eligibility formulas which take into account the peculiarities of employment in that industry).[20] The Board's purpose in establishing particularized eligibility formulas is to limit the franchise to those employees who work with sufficient continuity and regularity to establish a community of interest with other unit employees. See *Trump Taj Mahal Associates*, 306 NLRB 294, 295 (1992). Because each employment situation is different, the Board has an obligation to tailor its general eligibility formulas to the particular facts of the case; no single eligibility formula must

[19] See *Maine Apple Growers*, 254 NLRB 501, 503 (1981) (assuming existence of other pertinent factors, reasonable expectation of future employment requires only that seasonal employees be permitted to reapply the next season and that some of them be in fact rehired).

[20] I note that the Employer provides no case or other support for its proposed formula by which only those employees working at least 80% of the payroll periods in 2003 and 2004 would be part of the unit and eligible to vote.

be used in all cases. *American Zoetrope*, 207 NLRB 621, 623 (1973); *Saratoga County Chapter NYSARC, Inc.*, 314 NLRB 609 (1994).

Identifying an appropriate eligibility formula or formulas for the Employer's seasonal employees is even more complicated in the unique facts of this case. As stated above, the Employer has a year round operation, but it also has three peak periods in which varying numbers of seasonal employees are hired for varying lengths of time. Moreover, the petition was filed in November of 2004; during the American Thanksgiving peak season; however, the election will not be held until the 2005 Thanksgiving peak.[21] Thus, the election will be held many months after the petition was filed, and the formulas will be set well before the onset of the Thanksgiving peak during which the election is to be held.

In applying the above described principles to the issues raised in this case, I have decided that seasonal employees who meet one of the following criteria are regular seasonal employees, and they will be eligible to vote:[22] 1) those employees who worked 120 hours or more for the Employer in calendar year 2003 and in calendar year 2004, even if they have not been employed by the Employer during 2005;[23] 2) those employees who worked 120 hours or more for the Employer in calendar year 2004 and in calendar year 2002, and who were employed by the Employer for 40 or more hours during 2005 ; 3) employees who worked 120 hours or more for the Employer in either calendar year 2003 or 2004 and who worked either 120 hours or more in 2005, or who worked for at least 40 hours during the 2005 Easter season and who are also

[21] I note that during the hearing, there was a dispute over the production of certain subpoenaed documents and over the timing of the production of such documents. The hearing was recessed, and the Employer's payroll records for several years were placed in evidence on February 3. Due to the time it took to analyze the Employer records and the fact that there was an early Easter season this year, I have decided to conduct the election during the next peak season, which is the Thanksgiving season.

[22] Even if otherwise eligible under the eligibility formulas, any employee who was actually discharged by the Employer, rather than having his/her employment terminated due to the Employer's decreasing work load, will not be eligible to vote, unless the Employer re-hired the employee after the discharge.

[23] These employees certainly would have been eligible to vote had the election been held in 2004.

employed by the Employer during the Thanksgiving peak season.[24] The use of these formulas is consistent with the policy considerations that were inherent in *Sitka Sound Seafoods, Inc.*, 325 NLRB 685 (1998);[25] and the use of these formulas allows me to enfranchise those employees who have a sufficient employment history to demonstrate an ongoing interest in the terms and conditions of employment of the unit, whether or not they happen to be employed at the time of the election.

Date of Election

When an employer's operations are seasonal, the voting franchise may be made available to the largest number of eligible voters by holding the election at or near the seasonal peak. *Kelly Bros. Nurseries*, 140 NLRB 82 (1962). In these circumstances the Board tries to balance the twin goals of holding a prompt election while also enfranchising the greatest number of eligible employees. The Board may delay an election in a situation when an Employer's work force is substantially greater at a seasonal peak than in the off season. *Dick Kelchner Excavating Co.*, 236 NLRB 1414 (1978); *Tusculum College*, 199 NLRB 28 (1972) (delaying an election at a college until fall classes began, where many unit employees were not on campus during the summer).

Applying these principles, I find that it is appropriate to delay the election in this case until the next annual peak season which will begin in about October-November 2005. See *Oregon Frozen Foods Company and Ore-Ida Potato Products, Inc.*, 108

[24] Although these employees will not yet have worked 120 hours in 2005, the election is being held before they would have had a full opportunity to work the 120 hours during the 2005 season. The employees permitted to vote under this formula will have worked 120 hours in 2003 or 2004 and will have worked in both the 2005 Easter peak and the 2005 Thanksgiving peak. In these circumstances, these employees will have demonstrated a sufficiently strong and stable connection to the bargaining unit, even though it is not clear whether they will work 120 hours in 2005.

[25] See *Sitka Sound Seafoods, Inc.* October 6, 1997 Decision and Direction of Election, 19-RC-13479; *Sitka Sound Seafoods, Inc.*, 325 NLRB 685 (1998); *Sitka Sound Seafoods*, 327 NLRB 250 (1998), affirmed, *Sitka Sounds Seafoods, Inc. v. NLRB*, 206 F.3d 1175, 1182-1183 (D.C. Cir. 2000). The *Sitka Sound* formula is derived from the formula upheld in *Daniel Ornamental Iron Co., Inc.*, 195 NLRB 334 (1972).

NLRB 1668, 1669 (1954) (scheduling election during the next peak potato processing season, in light of issuance of Decision and Direction of Election just after end of the current season); *Knouse Foods Cooperative, Inc.*, 131 NLRB 801 (1961). I note the existence of an arguably contrary line of cases in which immediate elections have been conducted. However, in those seasonal cases, the number of year-round employees has been substantially greater in relation to the number of employees employed during peak seasons. See, e.g., *Baugh Chemical Company*, 150 NLRB 1034 (1965) (year round complement of 40 employees, as supplemented by 40 additional employees during spring season); *Saltwater, Inc.*, 324 NLRB 343, 344 (1997) (year-round complement of 26 employees up to a maximum of 85 employees). In the present case, by contrast, the core group dramatically expanded to over 300 employees in the November 2002 and November 2003 peaks, and expanded to over 400 employees in the November 2004 peak. Given this significant numerical disparity, I do not find that a postponement of the election until the seasonal peak would unduly hamper year-round employees in the enjoyment of their rights under the Act. Instead, in accordance with the usual practice in seasonal operations of this kind, I will direct that the election be held at or near the approximate seasonal peak, on a date which I will subsequently determine.[26] See *California Vegetable Concentrates, Inc.*, 137 NLRB 1779, 1781 (1962); *Kelly Bros. Nurseries, Inc.*, 140 NLRB 82, 86-87 (1962).

CONCLUSIONS

[26] Because Thanksgiving in the United States this year will occur on Thursday, November 24, 2005, it is anticipated that the election will occur sometime during the week or two prior to Thanksgiving week. The Region will request input from the parties in September or October, 2005, regarding possible appropriate election dates, and I will issue a Notice of Election in October, 2005, which sets the actual date of the election.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned. Upon the entire record in this proceeding, including the parties' arguments made at the hearing and the briefs filed by the Employer, and in accordance with the discussion above, I conclude and find as follows:

1. The hearing officers' rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The parties stipulated, and I find, that the Employer is a California corporation with a facility and principal office located in Atwater, California, where it is engaged in the processing and packing of sweet potatoes/yams. During the past 12 months, the Employer, in the course and conduct of its business operations, sold and shipped sweet potatoes/yams valued in excess of $50,000 directly to customers who themselves meet one of the Board's jurisdictional standards other than the indirect inflow or indirect outflow standards. In such circumstances, I find the assertion of jurisdiction appropriate herein.

3. The parties stipulated, and I find, that the Petitioner is a labor organization within the meaning of the Act.

4. The Petitioner claims to represent certain employees of the Employer, and a question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time, regular part-time, and regular seasonal employees employed by the Employer at its Atwater and Livingston, California facilities; excluding all other employees, casual and temporary seasonal employees, clerical employees, managers, guards, and supervisors as defined by the Act.

DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote whether or not they wish to be represented for purposes of collective bargaining by UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION LOCAL 1096. The date, time, and place of the election will be specified in the notice of election that the Board's Regional Office will issue subsequent to this Decision.

Voting Eligibility

Eligible to vote in the election are those full time and regular part time employees who are employed by the Employer in the unit on the date of the election, and who are employed by the Employer during the payroll period ending immediately before October 24, 2005,[27] including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are regular seasonal employees; that is, those employees who worked:

1) 120 hours or more for the Employer in calendar year 2003 and in calendar year 2004, even if they have not been employed by the Employer during 2005;

2) 120 hours or more for the Employer in calendar year 2004 and in calendar year 2002, and who were employed by the Employer for 40 or more hours during 2005 ;

3) 120 hours or more for the Employer in either calendar year 2003 or 2004 and who worked either 120 hours or more in 2005, or who worked for at least 40 hours during the 2005 Easter season and who are also employed by the Employer during the Thanksgiving peak season.

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[27] As explained below, October 24, 2005, is the date on which the eligibility list is to be received by the Regional Office.

Otherwise eligible employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced, are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, otherwise eligible employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Otherwise eligible unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who quit or are discharged for cause after the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

Employer to Submit List of Eligible Voters

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that the Employer must submit to the Regional Office an election eligibility list, containing the full names and addresses of all those employees who are then eligible to vote under the above-described formulas. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). These lists must be of sufficiently large type to be clearly legible.

To speed both preliminary checking and the voting process, the names on the list should be alphabetized (overall or by department, etc

To be timely filed, the eligibility list must be received in the NLRB Region 32 Regional Office, Oakland Federal Building, 1301 Clay Street, Suite 300N, Oakland, California 94612-5211, on or before **October 24, 2005.**[28] No extension of time to file this list will be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by facsimile transmission at (510) 637-3315. As I will make the list available to all parties prior to the election, please furnish a total of **two** copies, unless the list is submitted by facsimile, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

Notice of Posting Obligations

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices to Election provided by the Board in areas conspicuous to potential voters for a minimum of 3 working days prior to the date of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

RIGHT TO REQUEST REVIEW

[28] I recognize that some seasonal employees who had not worked enough hours as of October 25, 2005, to be included on the eligibility list, may work enough hours during the period prior to the election to be eligible to vote under the above described eligibility formulas. Such employees who meet one of the applicable formulas, but who are not on the eligibility list, may vote in the election subject to challenge.

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001. This request must be received by the Board in Washington by 5 p.m., EST on **April 13, 2005.** The request may **not** be filed by facsimile.

/s/

Dated: March 30, 2005

Alan B. Reichard, Regional Director
National Labor Relations Board
Region 32
1301 Clay Street, Suite 300N
Oakland, CA 94612-5211

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